

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

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4 MICHAEL FOLEY,

5 Plaintiff,

6 v.

7 CHRISTOPHER HERMES, et al.,

8 Defendants.

Case No. 2:16-cv-02369-APG-PAL

**ORDER (1) GRANTING MOTION TO
DISMISS; AND (2) DENYING MOTION
TO AMEND**

(ECF Nos. 8, 13, 27, 34)

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10 Plaintiff Michael Foley sued his children's schools and various school officials, as well as
11 his ex-wife, alleging that on various dates he was stopped from entering school grounds and
12 accessing school notices and records, in violation of his constitutional rights.¹ Defendants Paul
13 Carapucci, Jr., Monica Lang, Pamela Norton-Lindemuth, Christopher Hosein, Doreen Kwiecen,
14 Debbie Hancock, Carol Erbach, Christopher Hermes, and Canarelli Middle School move to
15 dismiss.

16 The defendants argue that Hosein was improperly served, and Canarelli Middle School is
17 not a proper defendant. They further argue that Foley's claims under 42 U.S.C. § 1983 fail as a
18 matter of law because he has not shown a violation of any right protected by the Constitution. In
19 the alternative, they argue that these individual defendants are entitled to qualified immunity.
20 Foley responds that his constitutional right to manage and direct his children's education was
21 violated. He also moves to amend his complaint to add or substitute a defendant and add claims
22 under the Fourteenth Amendment.

23 The parties are familiar with the facts in this case. I will not repeat them here except
24 where necessary. I grant the defendants' motions to dismiss with prejudice as to claims against
25 Canarelli Middle School and any claims arising out of allegations regarding Foley's daughter T,

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27 ¹ Foley has three children, who were identified by the first letter of their first names in his
28 complaint and the defendants' motion. I will also refer to them by these initials, T, M, and E, as
necessary.

1 and without prejudice as to all other claims against these defendants. I deny Foley's motions to
2 amend because they do not comply with Local Rule 15-1(a). But I will grant Foley leave to
3 amend his complaint as discussed below.

4 **I. ANALYSIS**

5 **A. Motion to Quash Service on Defendant Hosein**

6 "A federal court does not have jurisdiction over a defendant unless the defendant has been
7 served properly under [Federal Rule of Civil Procedure] 4." *Direct Mail Specialists, Inc. v. Eclat*
8 *Computerized Techs., Inc.*, 840 F.2d 685, 688 (9th Cir. 1988). Rule 12(b)(5) permits a defendant
9 to challenge the mode or method of service of the summons and complaint. Where the validity of
10 service is contested, the burden is on the party claiming proper service to establish its validity.
11 *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004). If service of process is insufficient, I
12 have the discretion to dismiss an action or to quash service. *See, e.g., S.J. v. Issaquah Sch. Dist.*
13 *No. 411*, 470 F.3d 1288, 1293 (9th Cir. 2006).

14 Under Rule 4(e), an individual must be served by delivering a copy personally, leaving a
15 copy at the person's dwelling with a resident of suitable age and discretion, or delivering a copy
16 to an agent authorized to receive service of process. An individual can also be served by
17 following state law. Fed. R. Civ. P. 4(e)(1). Nevada's rules for serving individuals are identical
18 to the federal rules. *See Nev. R. Civ. P. 4(d)(6)*.

19 According to the proof of service provided by Foley, the summons for Hosein was served
20 on Leah Rhodus, who was designated to accept service of process on behalf of the Clark County
21 School District. ECF No. 11 at 1. Foley has not shown that Rhodus was authorized to receive
22 service on behalf of Hosein. Because Hosein was not properly served, I will grant the motion to
23 quash service as to him.

24 **B. Motions to Dismiss**

25 In considering a motion to dismiss, "all well-pleaded allegations of material fact are taken
26 as true and construed in a light most favorable to the non-moving party." *Wyler Summit P'ship v.*
27 *Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). However, I do not necessarily
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1 assume the truth of legal conclusions merely because they are cast in the form of factual
2 allegations in the complaint. *See Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir.
3 1994). A plaintiff must make sufficient factual allegations to establish a plausible entitlement to
4 relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Such allegations must amount to
5 “more than labels and conclusions, [or] a formulaic recitation of the elements of a cause of
6 action.” *Id.* at 555.

7 i. Defendant Canarelli Middle School

8 The defendants move to dismiss claims against Canarelli Middle School because it is not a
9 distinct entity capable of being sued. Foley appears to accept this argument, instead asking for
10 leave to amend. Because Foley does not respond to this argument, he consents to dismissal. L.R.
11 7-2(d). Therefore, I dismiss all claims against Canarelli Middle School. Amendment would be
12 futile as to the school, as it is not a political subdivision capable of being sued. *See Nev. Rev.*
13 *Stat.* §§ 41.031; 41.305. Therefore, I deny leave to amend as to defendant Canarelli Middle
14 School. *See Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004) (“Futility alone can justify the
15 denial of a motion for leave to amend.”).

16 ii. Count I

17 The first count of Foley’s complaint alleges he was denied access to his child T’s
18 academic records and high school campus. The defendants argue that Foley does not have legal
19 custody of T, and therefore has no right to make any educational decisions for her.

20 In support of their motions, the defendants attach the divorce decree that sets out the
21 custody arrangement for Foley’s children. Foley argues that consideration of this decree would
22 convert the motion to one for summary judgment. Generally, “a district court may not consider
23 any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.” *Lee v. City of L.A.*, 250
24 F.3d 668, 688 (9th Cir. 2001) (quotation omitted). However, as an exception to this rule, “a court
25 may take judicial notice of matters of public record” under Federal Rule of Evidence 201. *Id.* at
26 689 (quotation omitted). The divorce decree is a matter of public record, and therefore I may take
27 judicial notice of it without converting the motion to one for summary judgment.
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1 Under the terms of the divorce decree, Foley's ex-wife has primary physical custody of all
2 three of their children, and sole legal custody of T. ECF No. 8-1 at 3. Foley and his ex-wife have
3 joint legal custody of their other two children: M and E. *Id.* In Nevada, "[l]egal custody involves
4 having basic legal responsibility for a child and making major decisions regarding the child,
5 including the child's health, education, and religious upbringing." *Rivero v. Rivero*, 216 P.3d 213,
6 221 (Nev. 2009). Without legal custody of T, Foley has no legal responsibility for her education,
7 and thus any allegations about her education cannot form the basis of a complaint regarding his
8 own constitutional rights. Therefore, I dismiss Count I of the complaint. Amendment would be
9 futile, so I deny leave to amend as to any claim arising out of allegations regarding T's education.
10 *See Nunes*, 375 F.3d at 808.

11 iii. Counts II and III

12 The defendants move to dismiss counts II and III because they are entitled to qualified
13 immunity. Foley responds that the defendants are not immune because they violated his
14 constitutional right to "participate and have a meaningful and significant role in [his] children's
15 academic and personal lives." ECF Nos. 12 at 11; 33 at 13.

16 "Qualified immunity shields government officials from liability for civil damages insofar
17 as their conduct does not violate clearly established . . . constitutional rights of which a reasonable
18 person would have known." *Brittain v. Hansen*, 451 F.3d 982, 987–88 (9th Cir. 2006) (quotation
19 omitted). Qualified immunity protects "all but the plainly incompetent or those who knowingly
20 violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In ruling on a qualified immunity
21 defense, I consider whether the evidence viewed in the light most favorable to the nonmoving
22 party shows the defendant's conduct violated a clearly established constitutional right. *Pearson v.*
23 *Callahan*, 555 U.S. 223, 232, 236 (2009). To be "clearly established," the "contours of the right
24 must be sufficiently clear that a reasonable official would understand that what he is doing
25 violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The plaintiff bears the
26 burden of showing that the right at issue was clearly established. *Sorells v. McKee*, 290 F.3d 965,
27 969 (9th Cir. 2002).

1 In Count II, Foley alleges that he was not allowed to pick up his daughter E from school
2 because of a court custody order and was not allowed to visit with her on campus during school
3 hours. In Count III, Foley alleges he was barred from being listed as the emergency contact for E,
4 was not sent unspecified parental notices, and was barred from accessing the elementary school
5 his daughter attended. Foley argues that the school officials violated his right to make decisions
6 concerning the care, custody, and control of his children. The defendants respond that this right is
7 limited, and Foley has not shown that the alleged actions violate a clearly established
8 constitutional right.

9 The Due Process Clause of the Fourteenth Amendment “protects the fundamental right of
10 parents to make decisions concerning the care, custody, and control of their children.” *Troxel v.*
11 *Granville*, 530 U.S. 57, 66 (2000). However, this right “is not without limitations” and “lower
12 courts have recognized the constitutionality of a wide variety of state actions that intrude upon the
13 liberty interests of parents controlling the upbringing and education of their children.” *Fields v.*
14 *Palmdale Sch. Dist.*, 427 U.S. 1197, 1204 (9th Cir. 2005).

15 The Seventh Circuit held in a similar case that the rights claimed by Foley were likely not
16 federal constitutional rights, and at the least were not clearly established. *Crowley v. McKinney*,
17 400 F.3d 965, 971 (7th Cir. 2005). In that case, a father complained about his son’s school’s
18 failure to provide him with school correspondence and refusal to allow him on campus during
19 school hours. *Id.* at 967–68. The son’s mother, from whom the father was divorced, had sole
20 custody of the son, but the father had equal rights to access education records. *Id.* at 967. The
21 father sued, arguing the school violated his right to participate in his children’s education. *Id.* at
22 968. The court held that schools “have valid interests in limiting the parental presence” and that
23 the father’s interest “in micromanaging his children’s education at the school properly chosen for
24 them” was not a clearly established constitutional right. *Id.* at 969, 971; *see also Lovern v.*
25 *Edwards*, 190 F.3d 648, 655–56 (4th Cir. 1999) (holding that school officials have the authority
26 to control parental access to school property).

1 Foley has not met his burden to show that his right to participate in his children's
2 education at the level of detail alleged is clearly established. He offers only a citation to *Meyer v.*
3 *Nebraska*, 262 U.S. 390 (1923), which invalidated a Nebraska law forbidding the teaching of
4 foreign languages in private schools. He argues that even though the school has previously
5 complied with records requests, he cannot practically exercise these rights anymore because he
6 cannot enter the school campuses. However, Foley has not shown that there is a clearly
7 established constitutional right for a parent to access school grounds, and the cases cited above
8 point to the opposite conclusion. Nor has he shown he has a clearly established right to be listed
9 as the emergency contact for a child for whom he does not have primary physical custody, or to
10 be given custody of that child in violation of a court order. Finally, he has not shown a clearly
11 established constitutional right to receive all school communications. *Cf. Crowley*, 400 F.3d at
12 971 (noting "the only federal constitutional right vis-à-vis the education of one's children that the
13 cases as yet recognize . . . is the right to choose the school and if it is a private school to have a
14 choice among different types of schools"). Therefore, Foley has not met his burden to overcome
15 the qualified immunity defense of these individual defendants, and I dismiss Counts II and III as
16 to them. However, amendment is not necessarily futile as it may be possible for Foley to plead
17 facts showing that these defendants violated some specific, clearly established constitutional
18 right. I therefore grant Foley leave to amend his complaint if such facts exist.

19 iv. Count IV

20 In the final count of his complaint, Foley alleges that in retaliation for filing a lawsuit
21 against defendant Monica Lang, he was barred from the campus of Canarelli Middle School. The
22 defendants respond that as alleged, Lang had already barred Foley from campus before he told
23 her about the lawsuit. The defendants thus argue that Foley cannot show that his bar from school
24 was caused by the suit. Foley does not respond to this argument, and therefore consents to the
25 dismissal of this count. L.R. 7-2. Therefore, I dismiss the fourth count of Foley's complaint.
26 However, amendment is not necessarily futile. I grant Foley leave to amend if he can plead facts
27 showing that he was retaliated against as a result of filing suit against Lang.
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